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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

LANCE, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on June 18, 1951.

OPINIONS BELOW

The opinion of the district court (R. 4) is reported at 95 F. Supp. 327. The opinion of the court of appeals (R. 12) is reported at 190 F. 2d 204.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the two-year statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 is applicable to actions by the United States under the Walsh-Healey Public Contracts Act.

2. Whether, if applicable to an action by the United States based on an administrative determination of liquidated damages, the statute of limitations begins to run before the administrative determination has been made.

STATUTES INVOLVED

The pertinent provisions of the Portal-to-Portal Act and the Walsh-Healey Public Contracts Act are set forth in the Appendix, *infra*, pp. 24-30, 31.

STATEMENT

This action was brought by the United States under the Walsh-Healey Public Contracts Act, 41 U. S. C. 35, *et seq.*, to recover liquidated damages of $1,990 with interest. The action was based on a decision of the Administrator of the Wage and Hour and Public Contracts Divisions of the Department of Labor finding the knowing employment of several underage minors in violation of stipulations required by the Act in contracts with the United States (R. 1-2).

The child labor violations in the instant case occurred from January to May 1945 (R. 3). An administrative complaint was filed on February 28, 1948 (R. 1). A trial examiner conducted a hearing on stipulated facts and reported his find-

ings and recommendations on September 10, 1948 (R. 1). The trial examiner's report was reviewed and revised by the Administrator of the Wage and Hour and Public Contracts Divisions, who found, in his decision of March 23, 1949, that the contractor owed the United States $1,990 as liquidated damages for the knowing employment of underage minors for a total of 199 days (R. 1-2). This decision became final on April 26, 1949 when the contractor sought no further review (R. 2). Upon the contractor's refusal to make payment in accordance with the administrative decision, this suit was instituted on September 7, 1949 (R. 3).

The complaint, after reciting the necessary jurisdictional allegations, merely set forth the administrative proceedings, asserted that "by reason of the findings and decision made in the proceeding set forth * * * defendant is indebted to the United States of America in the sum of $1,990.00", and demanded judgment for this amount (R. 2).

The administrative finding of knowing child labor violations was not challenged, and it was stipulated that the only question was whether the two-year statute of limitations in Section 6 of the Portal-to-Portal Act (Appendix, *infra*, pp. 30-31) barred the suit (R. 6, 9). Regarding the provision as generally applicable to the United States, the district court held the suit not barred because brought within two years of the administrative

decision. Consequently, it awarded judgment in favor of the United States.

The court of appeals reversed. It held, in reliance on the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454, that the cause of action accrued when the violations occurred, not when the administrative decision was entered, and that the action was therefore barred by the statute of limitations. (R. 12-13).[1]

REASONS FOR GRANTING THE WRIT

Congress enacted the Walsh-Healey Public Contracts Act in 1936 "to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. "The prescribed standards pertain to minimum wages, overtime compensation, non-employment of child and convict labor, and observance of certain health and safety requirements." *Anderson* v. *Schwellenbach*, 70 F. Supp. 14 (N.D. Cal.).

"The Act directs the Secretary [of Labor] to administer its provisions." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. He is empowered to "make investigations and findings" and to "prosecute any inquiry necessary to his functions." Section 4. He is further authorized to hold hearings "on complaint of a breach or violation" and "to issue orders requiring the attendance and

[1] A petition for a writ of certiorari is being filed concurrently herewith in the *Lovknit* case.

testimony of witnesses and the production of evidence under oath." His subpoenas are enforceable in the district courts. "The Secretary is directed to make 'findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor * * * shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.' (§ 5)." *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. at 503.

Pursuant to the statutory directions and authorizations, the procedure was early established in the Department of Labor, after investigations had indicated possible noncompliance, of issuing formal complaints and holding hearings before a trial examiner of the Public Contracts Division for the determination of violations of the Act. The trial examiner's report was referred to the Public Contracts Administrator for a decision which became final unless appealed to the Secretary of Labor. The administrative decision contained the formal determination of liquidated damages and became the basis for the application of the administrative sanctions provided by the Act. Upon failure of the contractor to make payment in accordance with the administrative decision after hearing, the matter was referred to the Attorney General for suit to collect the amount administratively found owing.

At the time of its enactment, no limitation was placed upon the period for enforcement by the Government of the Walsh-Healey statutory and contractual standards. There is no suggestion anywhere in the legislative debates relating to the Portal-to-Portal Act, passed some nine years later, that any abuses or evils resulted from the failure to provide a statute of limitations for Government actions under the Walsh-Healey Act.

Nevertheless, on the basis of a general reference in the Portal Act to the Walsh-Healey Act, the court below has ruled that the limitations provision of the Portal Act applies to Government actions. And, disregarding the prime importance Congress plainly attached to an administrative determination of Walsh-Healey Act violations, the court below has held that such actions are not timely even if brought within two years of the administrative determination. The decision below thus requires that the investigation of the contractor, the discovery of violations, the institution of administrative proceedings, the preparation for and conduct of hearings, the making of the initial administrative report, the completion of successive administrative appeals, the rendition of the final administrative decision, and the filing of suit by the Attorney General after failure to secure voluntary payment by the Secretary of Labor—all must be accomplished within two years, if the administrative procedure as contemplated by the statute and put

into practice by the Secretary of Labor is to be followed.

The issues presented by the imposition of this stringent requirement are of considerable importance because of the large number of pending cases in which they are involved, and the serious question as to the correctness of the decision below, in view of the statutory language, its legislative history and decisions of the federal courts inconsistent with that of the court below. Moreover, the effect of the decision, if permitted to stand, will be virtually to bring to a halt enforcement of the Walsh-Healey Act and to disrupt long standing procedures consistently followed by the Department of Labor and the Department of Justice in the administration and enforcement of the Public Contracts Act since its enactment over fifteen years ago. We do not believe that this unfortunate result is required by the terms of either the Portal or the Walsh-Healey Act. On the contrary, we submit that the proper construction of those statutes is that the Portal Act's two-year limitations period does not apply to Government actions at all, or, if it does, the period does not commence to run until the administrative proceeding has been completed.

1. (a). There are now pending in the courts and in various stages of administrative proceedings 53 cases in which this limitations question is involved.[2] The 53 cases affected represent

[2] Thirteen of these cases are in the district courts and 40 in administrative proceedings.

all but eight of the total number of actions now pending under the Act.[3] In virtually all of these cases, the claims will be entirely barred under the interpretation by the court below of Section 6 of the Portal Act.[4]

(b). Authoritative determination of the issues now is of further importance because of the severe impact of the decision below on existing administrative procedures. If allowed to stand, that decision would disrupt the entire system of enforcement procedures consistently followed by the Departments of Labor and Justice throughout the fifteen years of the Act's existence. This consequence not only emphasizes the importance of the issue here presented but also strongly suggests that the court of appeals' reading of the Portal Act is wrong because it would frustrate the Congressional purpose to "raise labor standards" through effective enforcement of the Walsh-Healey Act. *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 507.

A comprehensive review of all enforcement actions filed during this period indicates that the

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[3] Six of these eight are saved from the effect of the present decision solely because they were filed within the 120-day grace period following enactment of the Portal Act.

[4] In 47 cases, the entire amounts of the claims are over two years old. In the remaining six cases, only a small proportion of the claim is less than two years old, and the two years probably will have elapsed for the entire amounts before administrative proceedings can be completed and action filed in court.

possibility of devising any effective enforcement procedure in conformity with the decision below is extremely remote. Proceedings to collect liquidated damages are the principal sanction for enforcing the Act. There have been 54 such civil actions. Every one of these would have been barred had Section 6 of the Portal Act, as interpreted by the court below, been in effect at the time.

The lapse of two years or more before a case reaches the stage for court action is due to a variety of factors including lack of knowledge of the violations at the time they occur, the time necessarily consumed in investigating violations and in the administrative proceedings, and the fact that violations do not usually occur as single instances but continuously or intermittently over a period of time.

Though the Secretary of Labor receives reasonably prompt notice of the award of a contract subject to the Act, there are far too many contracts to permit inspection in all cases. Even in normal times, appropriations permit inspections of only about one-fourth of the number of contractors each year. An attempt is made to investigate at least new contractors, *i.e.*, those who have not previously held Government contracts, prior to the completion of their first contract. But most other contractors cannot, as a practical matter, be investigated prior to the completion of their con-

tracts. Thus more than two years may have elapsed before even an inspection can be made. This problem is greatly aggravated, of course, by the tremendous current increase in the number of contractors by reason of the national emergency. The ratio of inspections to contractors has sunk to approximately 17 per cent.

No matter how expeditious the discovery and processing of Walsh-Healey Act violations, the effect of the decision below will be seriously to undermine that Act's efficacy. For even if (1) investigation results in prompt discovery of a violation, (2) the administrative hearings and interdepartmental arrangements contemplated by Sections 2 and 5 of the Act are promptly carried to conclusion, and (3) a complaint is filed within two years from the date of the last violation, the bulk of the claim may still have been lost if the decision below stands. Unlike most causes of action which arise in full amount upon the occurrence of some event, these claims accrue from day to day and week to week as underage minors are employed or as the employer fails to pay the required wages. Thus, when an investigator discovers an employer who has been violating over the preceding two years (which, by administrative direction long antedating the decision below, is the period to which he confines his examination), one week of the two years' liability is cut off by this decision for every week which elapses before the complaint is filed in court. Even if, therefore, all

of the intervening events are accomplished within a period of two years, so little would be left of the claim as to render the sanction of liquidated damages virtually worthless.

A particularly adverse effect of the decision, then, would be to make it virtually impossible to resolve cases by amicable settlement without resort to the courts. In most cases where violations are found, under the present enforcement procedures, the contractor will voluntarily pay the damages, usually without the institution even of administrative proceedings, and court action is required in very rare instances. The importance of such amicable settlements in the program of enforcement is apparent from the fact that, in the period from July 1, 1948 through March 31, 1951, violations giving rise to a claim for liquidated damages were discovered in over 1687 cases,[5] yet it was found necessary to institute formal administrative proceedings in only 46 cases and to bring suit in only 25 cases. If the decision of the court below were to stand, the Government would be compelled to file suit even though settlement negotiations were still in progress.

Passing the additional burden on the courts that the decision below would thus impose, a limitation

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[5] Thirty-seventh Annual Report of the Secretary of Labor, p. 89; Thirty-eighth Annual, p. 219; Quarterly Summary of Statistics, Department of Labor, Wage and Hour and Public Contracts Division, first quarter of 1951 fiscal year, p. 3; second quarter of 1951 fiscal, p. 3; and third quarter of 1951 fiscal, p. 3.

period rendering legal enforcement so impracticable would destroy all incentive to contractors to make voluntary settlements for admitted or clear violations. Obviously, the breakdown in enforcement would be accompanied by noncompliance on the part of the unscrupulous, thus frustrating the objective of the Act to use the national purchasing power to improve labor standards.

2. These highly important practical considerations are sufficient, by themselves, to raise serious doubts as to whether Congress intended Section 6 of the Portal Act (*infra,* pp. 29-30) to apply to *Government* actions under the Walsh-Healey Act. In addition, the decision below fails to give proper effect to the decisions of this Court establishing the "principle of public policy" "settled beyond doubt or controversy" that a statute of limitations does not apply to the Government unless the intention to make it apply is expressed or "clearly manifested." *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U.S. 120, 125. See also *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112, 121; *Du Pont de Nemours & Co.* v. *Davis,* 264 U.S. 456, 462; *United States* v. *Whited & Wheless,* 246 U.S. 552, 561; *Societe Suisse pour Valeurs de Metaux* v. *Cummings,* 69 App. D. C. 154, 99 F. 2d 387, 395, certiorari denied, 306 U.S. 631. This is but an application of the "old and well-known rule" (*United States* v. *United Mine Workers,* 330 U.S. 258, 272-273) that "a general statute imposing restrictions does not impose them upon the Government itself

without a clear expression or implication to that effect." *United States* v. *Wittek,* 337 U.S. 346, 358-359. Thus, any restriction on the Government's right to enforce remedial legislation, such as the child labor law involved here, of which there was an admittedly knowing violation, should not be imposed in the absence of a clear indication of the congressional intention to curtail enforcement.

No such intention can be spelled out from the provisions of the Portal Act or its legislative history. The evidence and implications are all in the other direction. Neither the express terms or purposes of the Act nor the legislative history lend any support to the conclusion that Congress intended the complete change in the administration and enforcement of the Public Contracts Act that the decision below would entail. On the contrary, the statement of purposes in Section 1(a) of the Portal Act (see Appendix, *infra,* pp. 28-30) and the legislative debates reveal that Congress was concerned with problems incidental to employees' suits and not with basic enforcement procedures by the Government. The over-all purpose of the Portal Act, as its name implies, was to relieve employers of what Congress regarded as "windfall" claims by employees for minor "preliminary" or "postliminary" activities. The specific purpose of the limitations period was to remedy the problems arising out of "the varying and extended periods of time * * * under the laws of the several States" (Sec-

tion 1(a)).[6] State statutes of limitations, of course, are applicable to employee suits only, and have no application to the United States. *United States* v. *Summerlin,* 310 U.S. 414, 416. *United States* v. *Thompson,* 98 U.S. 486; *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U.S. 120, 125, 126; *Stanley* v. *Schwalby,* 147 U.S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 132; *Board of Commissioners* v. *United States,* 308 U.S. 343, 351. It would therefore be a serious distortion of the legislative purpose of the Portal Act, to construe it as applicable to the United States, thus requiring a complete change in the Government's basic methods of administration and enforcement.

That the limitation period was not directed at actions by the United States is further confirmed by the legislative debates which plainly show that the Walsh-Healey Act was brought within the Portal Act not to curtail governmental actions but because of the Congressional concern over the possibility of employee suits. The principal proponents of the legislation when called upon to explain reference to the Walsh-Healey Act despite

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[6] The entire paragraph in Section 1(a) under "Findings and Policy" with respect to the statute of limitations reads as follows:

> The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

the absence of portal suits under that Act, repeatedly answered, not that it was intended to bar Government suits, but that it was necessary to bar possible employee suits. Senator Donnell, who was chairman of the Senate subcommittee which considered the bill, and who guided the legislation through the Senate, stated that "there is unquestionably a right on the part of employees * * * to assert their rights under the Bacon-Davis or the Walsh-Healey [Public Contracts] Act. The mere fact that, so far as I know, no such claims [for portal-to-portal pay] have been made is not at all conclusive as to whether or not such claims have been made or hereafter will be made." 93 Cong. Rec. 2088. Similarly, Senator Cooper, a member of the Senate subcommittee which considered the measure, stated that "even though as yet no suits have been filed under those [Bacon-Davis and Public Contracts] acts, the contingent liability exists * * * and it seems to me that contracts entered into under these two acts present a contingent liability. *There is the opportunity for employees to sue* * * *" (93 Cong. Rec. 2130; italics supplied).

If it should eventually be established that employees cannot maintain their own actions under the Walsh-Healey Act, this would be no evidence that the statute was intended to apply to the United States as the only party to which it could apply. The clear intention to bar employee suits obviously cannot be converted into an intention to do some-

thing else because Congress may ultimately prove to have been mistaken as to the right of employees to sue. Cf. *Filardo* v. *Foley Bros.*, 297 N.Y. 217, reversed on other grounds, 336 U.S. 281.

3. But even if actions by the Government for liquidated damages under the Walsh-Healey Act are governed by the Portal Act and must be commenced "within two years after the cause of action accrued" (Section 6), the statute begins to run from the date of the Labor Department decision, and not from the date of the violations as held below. For it is well settled that a cause of action based upon an administrative determination accrues, within the meaning of statutes of limitation, only after the administrative determination has been made. *Woods* v. *Stone,* 333 U.S. 472; *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258. The practical considerations outlined above (*supra,* pp. 7-12) strongly reinforce the application of the established rule to Government suits under the Walsh-Healey Act.

Since the suit in this case was to recover on the administrative finding of liability for liquidated damages in the amount of $1,990, made in accordance with the express authorization of Section 5 of the Act (R. 26), and not upon the direct violation of the Walsh-Healey Act, it is squarely within this rule.

The court below held, however, that accrual of the cause of action did not hinge upon the adminis-

trative decision on the theory that the Walsh-Healey Act does not contemplate hearings by the Department of Labor as the basis for suits and that the Attorney General may proceed without awaiting an administrative decision. See *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454, 458 (C.A. 5), relied on by the court below. This conclusion is in square conflict with this Court's description of the administrative functions of the Secretary of Labor in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, the views of a specially constituted three-judge court in the ninth judicial circuit in *Anderson* v. *Schwellenbach*, 70 F. Supp. 14, and the decisions of five district courts entered before the ruling of the court below. See *infra*, pp. 19-20.

In the *Endicott Johnson* case, this Court described the functions of the Secretary of Labor under the Walsh-Healey Act in terms which leave no doubt as to the Congressional contemplation of an administrative determination by the Secretary of Labor as a condition precedent to enforcement.

"The Secretary [of Labor] *is directed* to make 'findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States * * *'. * * * The Act *directs* the Secretary to administer its provisions. * * * Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts. One

of her *principal functions* is the conclusive determination of questions of fact * * *. She could not perform her full *statutory duty* until she examined underpayments wherever the coverage extended * * *. It is the only basis on which she can compute liquidated damages *as she is required to do.* * * * The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation *as Congress had directed her to do* * * *. To perform her function she *must* draw inferences and make findings * * *." 317 U.S. at 503, 507-509; emphasis supplied.

Similarly, in the *Anderson* case, the court stated that "Administration of the act is entrusted to the Secretary of Labor who is authorized to make investigations and findings or to delegate these functions to representatives. Among other sanctions the act provides that violation of its standards renders the contractor liable to the United States for liquidated damages in the sum of $10 per day for each infringement of the child and convict labor standards and a sum equal to the amount of underpayments for violation of the minimum wage and overtime standards. Sums due the Government by reason of such violations may be withheld from any amounts owing on such contracts or may be recovered in suits brought by the Attorney General in the name of the United States. * * * *The ultimate administrative determination*

affords the basis for the withholding of sums or the institution of suit by the Government." 70 F. Supp. at 15, emphasis supplied.

Although the court below reached the same result as the Fifth Circuit Court of Appeals, five different district judges, prior to the court's decision in the instant case, reached an opposite conclusion. They did so in reliance upon the same understanding of the prime importance of the administrative determination under the Walsh-Healey Act that is evidenced in the *Endicott Johnson* and *Anderson* cases, *supra,* and all held the Government's action for liquidated damages not barred if brought within two years after the administrative determination. *United States* v. *Hudgins-Dize Co., Inc.,* 83 F. Supp. 593 (E.D. Va., Bryan, J.); *United States* v. *Harp,* 80 F. Supp. 236 (W.D. Okla., Broaddus, J.), affirmed on other grounds, 173 F. 2d 761 (C.A. 10), certiorari denied, 338 U.S. 816; *United States* v. *Craddock-Terry Shoe Corp.,* 84 F. Supp. 842 (W.D. Va., Paul, C.J.), affirmed on other grounds, 178 F. 2d 760 (C.A. 4); *United States* v. *Sweet Briar, Inc.,* 92 F. Supp. 777 (W.D. S.C., Wyche, J.); *United States* v. *Lance, Inc.,* 95 F. Supp. 327 (W.D. N.C., Warlick, J.) (the instant case). This rationale most clearly appears in the carefully reasoned opinion of District Judge Paul in the *Craddock-Terry Shoe Corp.* case, *supra,* dealing specifically with the statute of limitations point involved here (84 F. Supp. at 846):

> It seems the plain intendment of the statute that administrative proceedings, consisting of the hearing, the findings of fact, and the decision of the Secretary, shall be the process whereby the Secretary determines whether the United States has a claim and the amount of it; and only when this has been determined and the contractor has refused payment, is resort to be had to the courts. The administrative proceedings appear to be a prerequisite to an assertion of the claim for damages; and it would appear that not until the conclusion of these proceedings with the Secretary's decision does the Government have a right of action in the courts for collection of the damages. * * *

Although four of these decisions were rendered in the fourth judicial circuit and, therefore, are overruled by the decision below, the *Harp* case, which arose in the tenth judicial circuit, still remains outstanding and in conflict with the decision below.

The view that the Act contemplated suit in advance of an administrative determination can be reached only by a fragmentary reading of the statute, separating the sentence in Section 2 providing that suits shall be brought by the Attorney General, from the detailed provisions of Sections 4 and 5 confiding the administration of the Act in the first instance to the Secretary of Labor. It overlooks the important fact that statutory violations are, unlike ordinary breaches of contract, not self-

revealing and that, under the statutory scheme, the Attorney General would have no basis for proceeding except upon the request of, and the information supplied by, the Secretary of Labor.[7]

But even if the Attorney General can bring suit without a prior administrative determination, the statute clearly authorizes, if it does not require, a suit based on the administrative decision. And if the period of limitations on a direct action begins to run from the time of the violation, this does not mean that the period begins to run from the same time upon the separate cause of action to enforce an administrative determination.

If two causes of action are available in a given set of circumstances, one based upon an administrative determination of liability and another directly upon the statute, the one is not barred merely because the other, if brought, would have been. *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258. See also *United States* v. *Whited & Wheless,* 246 U.S. 552, and *Independent Coal Com-*

[7] The suggestion that the administrative proceeding might be held simultaneously with the court action is not only inconsistent with the terms and context of Section 5 of the Walsh-Healey Act, but is quite impracticable. The various district courts may be expected to differ widely in their procedures, some insisting on immediate court trials without waiting for the administrative decision, some inclined to submit the issues to juries, and others to masters. Some courts may also question the propriety of delegating the determination of liability to the Secretary of Labor after suit has been brought at his request. In these circumstances the administrative proceeding which is the heart of the statute would be relegated to a minor or completely insignificant role.

pany v. *United States,* 274 U.S. 640, 650. " 'If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been.' And the principle has frequently been recognized by this and other courts." *United States* v. *Whited & Wheless, supra,* at 564. Thus, regardless of when a cause of action based on a direct suit by the Attorney General might be deemed to accrue, the present cause of action did not accrue until the amount of the damages due had been fixed by administrative determination under the Walsh-Healey Act.

The fact that under this rule there is no period of limitations upon the commencement of administrative proceedings does not argue against its correctness. That was the situation in *Woods* v. *Stone, supra.* Moreover, the lack of any bar by limitations upon the enforcement of public law is not an unusual condition. On the contrary, it is "an element of the English law from a very early period." *United States* v. *Thompson,* 98 U.S. 486, 489; see also *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112; *Du Pont de Nemours & Co.* v. *Davis,* 264 U.S. 456; *United States* v. *Whited & Wheless,* 246 U.S. 552. Particularly is there no inequity where, as here, the statute "is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in

the contract." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. There would certainly seem to be no substantial policy reason for imposing a statute of limitations on Government suits relating to the knowing child labor violations involved in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1951.

APPENDIX

1. The pertinent portions of sections 1, 2, 4, 5 and 6 of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. §§ 35, 36, 38, 39) provide as follows:

> Sec. 1. * * * That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
>
> * * * * *
>
> (c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week; * * *
>
> (d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; * * *
>
> * * * * *

Sec. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than

minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

* * * * *

Sec. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * * and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

Sec. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the

production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

Sec. 6. * * * The Secretary of Labor may

provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

2. Sections 1(a) and 6 of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. IV, §§ 251(a), 255) provide as follows:

Sec. 1(a). The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and

the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by con-

sequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

* * * * *

Sec. 6. Statute of Limitations.—Any action

commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

* * * * *

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the

Supreme Court of the United States

October Term, 1951

No. 293

UNITED STATES OF AMERICA,
Petitioner

v.

LANCE, INCORPORATED,
Respondent

FRANK H. KENNEDY,
Charlotte, North Carolina

WELBORN B. CODY,
Atlanta, Georgia
Counsel for Respondent.

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I. The Statute of Limitations in the Portal-to-Portal Act is Applicable to Suits Instituted by the United States Under the Walsh-Healey Act.

II. The Cause of Action Accrued When the Violation of the Act Occurred and Since Suit Was Not Brought for More Than Four Years After the Violation Occurred the Suit is Barred by the Two-year Statute of Limitations in the Portal-to-Portal Act.

III. Comment on the So-Called "Practical Considerations" Referred to in Petitioner's Brief.

ARGUMENT

I. The Statute of Limitations in the Portal-to-Portal Act is Applicable to Suits Instituted by the United States Under the Walsh-Healey Act.

The Walsh-Healey Act provides, Sec. 2 (p. 25 of brief of petitioner) that "any breach or violation of any of the representations and stipulations in any contract . . . shall render the party responsible therefor *liable to the United States of America for liquidated damages* in addition to damages for any other breach of such contract *in the sum of $10.00 per day . . .*" (Emphasis added).

The statute of limitations in the Portal-to-Portal Act, Sec. 6 (p. 31 of brief of petitioner) provides "Any action commenced . . . to enforce any cause of action for . . . *liquidated damages, under . . . the Walsh-Healey Act . . .*" shall be barred as therein provided. (Emphasis added).

The complaint in this action alleges, paragraphs 4 and 5 (p. 1 of the transcript of the record) that respondent is indebted to the United States of America in the sum of $1990.00 *as liquidated damages under the Walsh-Healey Act*, that is, $10.00 per day for a total of 199 days. Thus, the complaint alleges an indebtedness by the respondent in the exact words of the Walsh-Healey Act as to liability and in the exact words of the Portal-to-Portal Act which bars any action for *"liquidated damages under . . . the Walsh-Healey Act"*. (Emphasis added).

Congress could not have made any clearer its intent that the statute of limitations of the Portal-to-Portal Act should apply to the liquidated damages of the Walsh-Healey Act because that is exactly what the Portal-to-Portal Act says.

The Walsh-Healey Act provides that anyone liable under the Act is liable to the United States of America for liquidated damages. *No other liquidated damages of any kind*

are mentioned in the Act; therefore, when it refers to liquidated damage, it could only refer to the liquidated damages for which there is liability to the United States.

As was said by Judge Sibley of the United States Court of Appeals for the Fifth Circuit in the opinion in the case of *United States of America* v. *Lovknit Mfg. Co., Inc. et al.* (bottom of p. 23 and top of p. 24 of the record of the proceedings in said court, No. 294 on petition for certiorari in this Court):

> "There is no need to name the United States in a statute if the intent to affect the United States is clear otherwise, as from the subject matter dealt with".

The petitioner cites no authority in support of its contention that the statute of limitations in the Portal-to-Portal Act does not apply to the United States, and so far as we know there is no such authority. All of the courts, so far as we know that have expressly passed on this point, have held that the statute of limitations in the Portal-to-Portal Act does apply to suits instituted by the United States under the Walsh-Healey Act. *United States* v. *Harp*, 80 F. Supp. 236 (W. D. Okla., Broaddus, J.); *United States* v. *Craddock-Terry Shoe Corp.*, 84 F. Supp. 842 (W. D. Va., Paul, C. J.); *United States* v. *Sweet Briar, Inc.*, 92 F. Supp. 777 (W. D. S. C., Wyche, J.); *United States* v. *Lance, Inc.*, 95 F. Supp. 327 (W. D. N. C., Warlick, J.), (the instant case); *United States* v. *Lance, Inc.*, 190 F. 2d 204 (Court of Appeals for the Fourth Circuit) (the instant case); *United States* v. *Lovknit Mfg. Co., Inc., et al.*, 90 F. Supp. 679 (N. D. Texas, Atwell, C. J.); *United States of America* v. *Lovknit Mfg. Co. Inc.*, 189 F. 2d 454 (Court of Appeals for the Fifth Circuit), (No. 294 on petition for certiorari in this Court).

Most of the above cases are referred to on p. 19 of the

brief of petitioner in this case but none of them hold with the petitioner on this point. All of them expressly hold contrary to the petitioner's contention except that in the case of *United States* v. *Hudgins-Dize Co. Inc.*, 83 F. Supp 593 (E. D. Va. Bryan, J.) the judge seemed to assume that the statute of limitations does apply to the United States and clearly does not hold to the contrary.

II. The Cause of Action Accrued When the Violation of the Act Occurred and Since Suit Was Not Brought for More Than Four Years After the Violations Occurred the Suit is Barred by the Two-year Statute of Limitations in the Portal-to-Portal Act.

The Walsh-Healey Act provides as pointed out above that any party responsible for any breach or violation shall be liable to the United States of America for liquidated damages *in the sum of $10.00 per day.* It is the position of the respondent that if an employer violated the Act by employing one person for one day contrary to the Act the United States by the Attorney General could sue for that single violation the next day after it occurred. There would necessarily be a separate cause of action for each day's violation; if this were not true an employer whose violation consisted of only one day would not be liable at all.

The section of the Portal-to-Portal Act dealing with the statute of limitations, sec. 6 (p. 31 of brief of petitioner) provides that if the cause of action accrued prior to May 14, 1947 (as in this case) any action may be commenced within whichever of the following periods is shorter: (1) Two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations.

The general rule is that a statute of limitations begins to run at the time the cause of action accrues. When the basis

of the cause of action is an act prohibited by law or contract the cause of action accrues when the prohibited act is done. Here the prohibited act is employment of minors and under the general rule the statute of limitations would start running at the conclusion of each day's violation.

There is nothing in the language of the Portal-to-Portal Act to take it out of the general rule but on the contrary, its language and the language of the House Committee on the Judiciary in its report to Congress on the Act clearly show that the general rule was meant to apply.

The Judiciary Committee in its report to Congress had the following to say regarding the statute of limitations in the Portal-to-Portal Act (House Report No. 71, February 25, 1947, 1947 U. S. Code Congressional Service, page 1035):

> "1. STATUTE OF LIMITATIONS
>
> "Actions for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory) must be commenced within 1 year after the cause of action accrued. This provision applies to actions accruing both before and after the effective date of this act. Causes of action which had accrued more than 1 year prior to the effective date of the act may nevertheless be commenced within 6 months after said effective date. As to the individual claimant, the action is deemed to be commenced when he is named as a party to the action. In other words, the commencement of an action does not stop the running of the statute for all those who later become parties. Causes of action which on the effective date of the act are already barred by any applicable State statute of limitations are not revived but remain barred. In computing the 1-year or 6-month period, the period or periods of time during which a defendant is not found within the United States so that process may be served on him, will be excluded.

> "The limitation herein provided applies only to the statutory actions or proceedings set forth in the acts enumerated in section 5 of H. R. 2157. Actions under the common law, or under State statutes for recovery of wages are not affected.
>
> "The desirability of a uniform Federal statute of limitations has often been pointed out. In the absence of such a statute, courts are required to enforce the State statute deemed to be applicable. (See U. S. Code, title 28, sec. 725). This has caused confusion and a lack of uniformity throughout the Nation."

The Committee's report makes no mention of any administrative determination as fixing the time when the statute of limitations would begin to run. The Committee here is giving a summary with regard to the statute of limitations and if the contention of the petitioner is correct, *it left out of the summary what would have been the most important thing to include*—that is, that the statute would not begin to run until there had been an administrative determination.

The Committee says that the desirability of a uniform Federal statute of limitations has often been pointed out, that in the absence of such a statute courts are required to enforce the state statutes and that this has caused confusion and a lack of uniformity throughout the nation. The inescapable inference is that the adoption of the proposed law would eliminate such confusion and lack of uniformity. It is submitted that if the contention of the petitioner is correct, the effect of the statute would be just the opposite of what the Committee meant its effect to be, because the situation would be far worse than if the Federal courts applied the state statutes. At least, the state statutes require an action to be brought within a specific period of time, even though the time specified may vary in the different states; while according to the contention of the petitioner, there would

never be any specific period of time dating from the occurrence of the violation within which suit must be brought. The administrator could take any number of years within which to make his determination and any number of years, plus the two years prescribed by the statute, add up to an indefinite period in each and every case.

The findings of Congress in connection with the Portal-to-Portal Act (printed in the brief of the petitioner, pp. 28, 29 and 30) state very clearly that it was the intention of Congress to give employers some relief, and it is stated (middle of p. 30) in the findings that "the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry". The Congress here refers to the State statutes of limitation and it plainly intends to give employers relief in this respect rather than impose additional burdens upon them as would plainly be the case if the contention of the petitioner were allowed to prevail.

Section 6, paragraph (b) of the Portal-to-Portal Act (p. 31, brief of petitioner) provides that the action may be commenced within whichever of the following periods is the shorter: "(1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations", and in paragraph (c) it provides that the action shall not be barred by paragraph (b) if it is commenced within 120 days after May 14, 1947, unless at the time commenced it is barred by an applicable State statute of limitations.

These references to State statutes of limitation seem to make it clear beyond any doubt that the law meant the statutes of limitation to run from the time of the violation of the Act, or, in other words, the law contemplates that the

cause of action arose when the Act was violated and not upon the final determination of any administrative proceeding, for the reason that *in referring to State statutes the Act could not possibly have had in contemplation any administrative proceeding before the Secretary of Labor.*

There is nothing in the Walsh-Healey Act that requires the Secretary of Labor to conduct an administrative proceeding with regard to liability for liquidated damages; nor is there anything in the Act that *requires* the Secretary of Labor to conduct an inquiry with regard to *any* matter except as provided in paragraph 3 of the Act relating to black-listing. The matters with regard to which administrative proceedings are to be conducted are left to the discretion of the Secretary of Labor. The Act provides in Sec. 5 (p. 26 of brief of petitioner) that "Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract . . . the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath". The language is "shall have the power" but there is nothing in the Act that makes it obligatory upon the Secretary of Labor to exercise this power and, therefore, such an administrative proceeding is necessarily optional with him.

If Congress had intended that an administrative determination would be a prerequisite to starting a suit against an employer under the Act, it would have (1) made such an administrative determination mandatory and (2) would have required that such a determination be made within a specified length of time. The fact that the Act does not provide for either of these things indicates that Congress had no intention of postponing the beginning of the running of the statute until such a determination had been made.

As was said by Judge Sibley in the opinion in the case of *United States of America* v. *Lovknit Manufacturing Co. Inc., et al., supra*:

> "Stated otherwise the assertion is that such hearings and findings are a prerequisite to a suit by the Attorney General. We do not agree. The Act nowhere so conditioned his suit. Many breaches of contract can occur in which a hearing and a finding of facts would be of no help but a cause of delay."

Section 3 of the Walsh-Healey Act provides as follows:

> "The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35-45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred."

It is required as a prerequisite to the "black-listing" of a contractor under Section 3 of the Act that a finding be made by the Secretary of Labor to the effect that such contractor has breached an agreement or representation required by the Act. This section is in contrast to Section 2 of the Act (Page 25 of the petition for certiorari), which not only does not require an administrative determination based upon a formal hearing but does not require a finding of any sort by the Secretary of Labor as a prerequisite to resorting to the remedies therein referred to, including the institution of suit in court for liquidated damages.

Under the Act (Sec. 2), the Attorney General is given the power to bring suit for liquidated damages without any restrictions. If it had been the intention of Congress to make the right of the Attorney General to bring suit subject to an administrative determination, it would have said so.

It is contended that if a cause of action arose when the violation occurred, there was a second cause of action that arose when the administrative determination was made, but the statute is clear that only one cause of action is created by the Act. The language is (Sec. 6, Portal-to-Portal Act, p. 31 of brief of petitioner) in each of the three sub-paragraphs (a), (b) and (c): "If *the* cause of action" (Emphasis added) accrues or accrued "on or after" or "prior to", etc., then it is barred within the time stated. There is no suggestion anywhere of more than one cause of action.

The Court of Appeals for the Fifth Circuit held in the case of *United States* v. *Lovknit Manufacturing Co. Inc., et al., supra,* as did the Court of Appeals for the Fourth Circuit in the instant case, that the cause of action accrued when the violations occurred. There is, therefore, no conflict between the Courts of Appeals. Furthermore, all of the District Court decisions that had held contra were reversed by these decisions of the Courts of Appeals for the Fourth or Fifth Circuits except the case of *United States* v. *Harp, supra.* It is submitted that the Judge in this opinion seemed to assume, without explanation, that the question here presented falls within that class of cases where the statute in question makes liability dependent upon the decision and action of an administrative board so that a cause of action does not arise until the board has acted, and made no attempt to explain why this rule should apply in view of the fact that the Walsh-Healey Act does not make the cause of action dependent upon the administrative determination.

The petitioner in its brief cites the case of *Endicott John-*

son Corp. v. *Perkins,* 317 U. S. 501 and quotes several excerpts from it. But in that case there was involved the validity of a subpoena issued by the Secretary of Labor in an administrative proceeding and the language of the court throughout the opinion related to the interpretation of the Walsh-Healey Act as it applied to that particular situation, and it does not follow that the language of the court would necessarily apply to the question presented in the instant case.

The same can be said with reference to the case of *Anderson* v. *Schwellenbach,* 70 F. Supp. 14, a District Court case in which action was brought by the plaintiffs to enjoin administrative proceedings against them in the Department of Labor under the Walsh-Healey Act.

In the case of *Woods* v. *Stone,* 333 U. S. 472, involving the Emergency Price Control Act of 1942, the statute provided that the action should be brought within one year "of the occurrence of the violation". The real question in the case was when the violation occurred—whether it occurred when the rentals were collected or on the date when the landlord was ordered to refund the excess. The Supreme Court said in its opinion:

> "The statute and regulations made his rentals tentative but not unlawful. Until the contingency of readjustment occurred the tenant could have had no cause of action for recovery of any part of the rental exacted by the landlord. The cause of action now does not rest upon, and hence cannot date from mere collection. The duty to refund was created and measured by the refund order and was not breached until that order was disobeyed".

In the instant case, the employment of the minors was unlawful at the date of employment, and was made so by

statute and not by administrative determination; the "breach" occurred upon violation of the statute and hence the statute began to run at that time.

In *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, the Supreme Court said that the action was grounded upon the determination evidenced by the certificate of over-assessment issued by the Commissioner of Internal Revenue; that upon delivery of this certificate to the plaintiff there arose a cause of action on which the suit was brought and the statute of limitations began to run only from the date of such delivery. This certificate of over-assessment constituted a formal admission of liability of the United States to the taxpayer and the holding of the court that the delivery of such a *certificate admitting liability* created a cause of action creates no precedent or reason for holding that the cause of action in the instant case did not arise until an *administrative determination* had been made. No admission of liability is involved in the instant case.

III. Comment on the So-Called "Practical Considerations" Referred to in Petitioner's Brief.

From Page 5 to Page 12 of the petitioner's brief there is a statement of facts and conclusions which are referred to on p. 12 as "practical considerations".

On p. 5 the statement is made that "Pursuant to the statutory directions and authorizations, the procedure was early established in the Department of Labor, after investigations had indicated possible non-compliance, of issuing formal complaints and holding hearings before a trial examiner . . ." On p. 6 the procedure is described as follows: "Investigation of the contractor, the discovery of violations, the institution of administrative proceedings, the preparation for and conduct of hearings, the making of the initial administrative

report, the completion of successive administrative appeals, the rendition of the final administrative decision, and the filing of suit by the Attorney General after failure to secure voluntary payment by the Secretary of Labor." *We submit that there is no requirement in the Walsh-Healey Act that this cumbersome, burdensome and expensive procedure be resorted to where there is a claim for liquidated damages.* This procedure involves, on the part of the contractor, preparation for and attending an administrative hearing, employing an attorney, presenting evidence, two administrative appeals if the finding is adverse, and then if the final determination is adverse, he must go through a regular trial in the District Court if he still contends that he is not liable. It is difficult to believe that Congress ever intended that its citizens should be harassed with the annoyance and expense of two lawsuits when one would serve the purpose equally well. The administrative procedure serves a useful function in connection with some matters under the jurisdiction of the Secretary of Labor, but there is no need to invoke it when the contractor denies liability, and it is clear that a lawsuit will result.

On p. 11 of the brief it is stated that it was found necessary to institute formal administrative proceedings in only 46 cases and to bring suit in only 25 cases. This means that settlements were obtained in 21 cases by the administrative procedure but in 25 of the cases the administrative procedure accomplished nothing at all. In all probability, settlements in the 21 cases would just as easily have been obtained if the original suit had been instituted in the District Court without any administrative proceeding at all.

If original suits were instituted in the District Courts and the cumbersome administrative determination eliminated, the Department of Labor would save the long period of time that it takes for an administrative determination to be had

and would have little difficulty in getting its suits instituted in the District Courts within two years from date of violation.

On p. 7 of the brief it is stated: "Moreover, the effect of the decision, if permitted to stand, will be virtually to bring to a halt enforcement of the Walsh-Healey Act and to disrupt long standing procedures consistently followed . . ." Judge Sibley said in the opinion in the case of *United States* v. *Lovknit Manufacturing Co., supra*: "We equally do not doubt that if it be considered that the entire case may be conveniently tried without any administrative hearing, that can be done". It is our position that the Department of Labor has given the Walsh-Healey Act an interpretation that was unwarranted, that no administrative hearing is required in suits by the United States for liquidated damages under the Act, that this procedure with reference to suits for liquidated damages should never have been instituted, that the Department of Labor has only itself to blame for its error in setting up a procedure that is neither required nor justified, and that this procedure, as regards suits for liquidated damages, ought to be abandoned in any event.

The Act can be effectively enforced by bringing suits for liquidated damages originally in the District Courts and eliminating the administrative proceeding altogether. It is stated in the brief, p. 7, that there are now pending in the courts and in various stages of administrative proceedings 53 cases and that in virtually all of these the claims will be barred under the interpretation given by the court below of Sec. 6 of the Portal Act. We are not given the exact facts as to the number that will be barred but no matter what the number is, in all probability, they would not have been barred if the original suits had been instituted in the District Courts at the time the administrative proceedings were instituted.

These so-called "practical considerations" cannot in any event, however, have any effect upon the ruling of the court if the language of the statutes is clear, as we contend it is, to the effect that the statute starts running when the violations occur.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court and that the petition for writ of certiorari should be denied.

FRANK H. KENNEDY,
Charlotte, North Carolina

WELBORN B. CODY,
Atlanta, Georgia

Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 294

UNITED STATES OF AMERICA, PETITIONER

v.

LOVKNIT MANUFACTURING COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on June 1, 1951.

OPINIONS BELOW

The opinion of the district court (S.R. 6)[1] is reported at 90 F. Supp. 679. The opinion of the court of appeals (S.R. 22) is reported at 189 F. 2d 454.

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[1] "S.R." refers to the volume of the record entitled "Supplemental Transcript of Record".

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED[2]

1. Whether the two-year statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 is applicable to actions by the United States under the Walsh-Healey Public Contracts Act.

2. Whether, if applicable to an action by the United States based on an administrative determination of liquidated damages, the statute of limitations begins to run before the administrative determination has been made.

STATUTES INVOLVED

The pertinent provisions of the Portal-to-Portal Act and the Walsh-Healey Public Contracts Act are set forth in the Appendix to the petition for a writ of certiorari filed in *United States* v. *Lance,* No. 293.

STATEMENT

This is an action by the United States under the Walsh-Healey Public Contracts Act, 41 U.S.C. 35 *et seq.* to recover $6,796.90 as liquidated damages administratively found to be owing the United States after hearings in the Department of Labor under Section 5 of the Act (R. 7-11). At the conclusion of those hearings, the contractor was found

[2] The questions are identical with those presented by the petition filed concurrently herewith in *United States* v. *Lance,* No. 293.

to have violated the child labor and overtime requirements of the Act in the performance of twelve contracts with the United States (R. 21-22).

The contracts were performed during the period from April 1942 to December 1945 (R. 30, 53-54) and the violations were discovered by inspections made in 1946 (R. 52). Administrative proceedings were commenced under Section 5 of the Act by the filing of a complaint on January 27, 1947 (R. 27). A trial examiner held a hearing on March 20-21, 1947 (R. 29), and issued his report on December 29, 1947 (R. 42). The trial examiner's report was reviewed by the Administrator of the Public Contracts Division, whose decision became final on March 21, 1949 (R. 21, 26, 9-10).

The contractors refused to pay the sum found due by the Administrator, and the present suit, based on the administrative decision, was commenced on December 28, 1949 (R. 7). In addition to the necessary jurisdictional averments, the complaint alleged only the administrative proceedings as the basis for the cause of action and demanded judgment for the amount found owing in that proceeding (R. 7-11). The Government moved for summary judgment, annexing to its motion a copy of the administrative proceedings (R. 19). After trial, the district court directed the entry of a judgment denying relief (R. 81, S.R. 3-6), on the grounds that the suit was barred by the two-year limitations period fixed by Section 6 of the Portal-to-Portal Act, and that the administrative finding

that the contractors had knowingly employed under-age minors was not supported by the preponderance of the evidence (S.R. 3-10).[3]

The court of appeals concluded "it is necessary to consider only the question of bar by limitation" (S.R. 23). It held that the statute of limitations, though not mentioning the Government, nevertheless applied to actions by the United States under the Walsh-Healey Act. It held further that the Government's cause of action accrues and that the statute of limitations begins to run from the date of the violations rather than the administrative determination. Accordingly, the action was held barred although filed within two years of the administrative decision.

REASONS FOR GRANTING THE WRIT

The questions presented by this petition are identical with those presented by the petition in *United States* v. *Lance, Incorporated,* No. 293, filed concurrently herewith. The considerations calling for review by this Court are fully presented in that petition.

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[3] Violations of the overtime requirements of the Act were established at the administrative hearings by undisputed evidence, but the district court made no reference to the administrative findings on these violations in dismissing the Government's complaint. The administrative findings with respect to child labor violations were also based upon undisputed documentary evidence, except as to one of the five under-age minors involved. In the event the writ of certiorari is granted on the statute of limitations issue, the Court may also wish to consider the proper scope of judicial review of factual findings made in the administrative proceedings.

CONCLUSION

It is respectfully submitted that, for the reasons set forth in the petition in *United States* v. *Lance,* this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 963398 184

REASONS FOR GRANTING REHEARING AND ISSUING THE WRITS

1. Subsequent to the filing of the petitions for certiorari in the instant cases, this Court's decision in *McMahon* v. *United States,* No. 17, this Term, decided November 5, 1951, was handed down. The seeming similarity between the statute of limitations issue decided in the *McMahon* case and the issue presented by the instant cases indicates the possibility that the *McMahon* decision may have been deemed determinative of the issues in the instant cases. The substantial differences between the *McMahon* case and the instant cases, as revealed by the Court's opinion in the former, are, we believe of such a nature as to warrant independent review by this Court of these cases. We are impelled to point out the substantial considerations quite different from the controlling factors in the *McMahon* case because the issues presented here are of great importance to the Government not only because of the numerous other pending claims entirely barred by the decisions below but because of their disruption of long-standing enforcement procedures and the impracticability of devising new procedures in conformity with them (see Petition for Writ of Certiorari in No. 293, pp. 7–12).

The holding of the *McMahon* decision that the two-year statute in the Suits in Admiralty Act runs from the date of the actionable wrongs

rather than from the date of the administrative disallowance of the seaman's claim against the Government rests upon the particular legislative situation there involved and upon other grounds not present in the instant cases. This is made clear by the *McMahon* opinion.

The primary ground for the decision in *McMahon* appears to be contained in the following paragraph:

> It [the Suits in Admiralty Act] was enacted several years before suits such as the present, on disallowed claims, were authorized. Certainly during those years the limitation depended upon the event giving rise to the claims, not upon the rejection. When later the right to sue was broadened to include such claims as this, there was no indication of any change in the limitation contained in the older Act.

The situation here is precisely the reverse. The statute of limitations is part of the Portal-to-Portal Act of 1947, enacted some 11 years after the Walsh-Healey Public Contracts Act which gives rise to the substantive claim. During this entire 11-year period, the statute was consistently construed and enforced on the assumption that the administrative determination of liability, and not the violation itself, gave rise to the claim on which suit could be brought. This ground of the *McMahon* decision is, therefore, entirely lacking in these cases.

Another basis of the *McMahon* decision is that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." This principle, far from supporting the decision of the Courts of Appeals in the instant cases, suggests the applicability of the equally well established principle that statutes of limitation "are to be construed strictly in favor of the sovereign." *United States* v. *Whited & Wheless,* 246 U. S. 552; *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640; *Du Pont de Nemours & Co.* v. *Davis,* 264 U. S. 456. Application of this principle in the instant case would plainly require reversal of the decisions below.

The remaining reason specified in the *McMahon* opinion is that:

> Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus *to delay indefinitely knowledge by the Government that a claim existed.* We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of *an action against the United States.* [Emphasis supplied.]

In the instant cases, on the other hand, the statute of limitations has been construed by the

Courts of Appeals in such a manner as to prejudice claims *by* the Government and to start the period running before there is opportunity for the acquisition of "knowledge by the Government that a claim existed." Unlike the situation in the *McMahon* case, where the claimant knows immediately of the injury out of which his claim arises, and unlike the case of the underpaid employee who is in a position to know of the violation at the time it occurs, violations of the Public Contracts Act do not come to the attention of the Government until an investigation can be conducted, which may be long after the violations have occurred. Thus, much, if not all, of a two-year period may have expired before the violations even come to the attention of the Government. This consideration strongly suggests a legislative intent quite different from the legislative intent in the *McMahon* situation. Cf. *United States* v. *Wurts,* 303 U. S. 414; *Woods* v. *Stone,* 333 U. S. 472, 477.

2. A question expressly left unresolved in the *McMahon* case because of the deficiencies in that record is presented by one of the instant cases, *i. e.,* the question "whether the statute of limitations is tolled" pending completion of the requisite administrative proceedings.

Unlike the record in *McMahon,* the record in the *Lovknit* case, No. 294, does disclose the date on which the administrative complaint was filed (R. 8), the date on which the administrative deci-

sion became final (R. 9–10), the dates on which the under-age minors were knowingly employed (R. 47–50), and the date on which complaint was filed in the district court to enforce the administrative award (R. 7). If the two-year period, assuming it is applicable, is tolled during the pendency of the administrative proceedings, as suggested by the *McMahon* opinion, that part of the claim here presented which arose subsequent to November 4, 1945, would not be barred (R. 49). Though a relatively small portion of this particular claim would be thus saved, such a modification of the decision of the courts below would substantially mitigate the drastic effects of that decision, and might afford a practicable means of devising effective new procedures.[1]

As the administrative proceedings, under the scheme of this Act, involve the duty of hearing witnesses and making the findings of fact and decision which are ordinarily part of the judicial process, it seems appropriate that the time consumed thereby should not be charged against any period of limitation. Where judicial review is not based on administrative proceedings, the functions of taking evidence and appraising it occur after

[1] As pointed out in the petition for certiorari in No. 293 (Pet. pp. 7–8), the Government's claims in some 45 pending cases (representing all but eight of the total number of pending cases) are entirely barred under the decision below. At least part of the Government's claim would be preserved in over half these cases if the statute of limitations is tolled during the administrative proceedings.

the limitations period is tolled by the filing of a complaint in court. Also, another purpose of the statute of limitations is to compel the initiation of formal proceedings, and this purpose is served by the institution of administrative proceedings.

3. A further reason for this petition for rehearing is that there is additional substantial ground in this Court's decisions on the "primary jurisdiction" doctrine, which were not called to the Court's attention in the petitions for certiorari, supporting the Government's position that an administrative decision is an indispensable prerequisite to judicial decision, and, therefore, that the Government's cause of action under the Walsh-Healey Act accrues only after an administrative determination of liability. See *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439–442; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295; *Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437.

The ruling in the decisions below, that the Walsh-Healey Act does not contemplate administrative proceedings as a basis for suits by the Attorney General, appears wholly inconsistent with these decisions of this Court. Since the Court's holdings in those cases related to a statutory provision expressly giving the shipper a right to pro-

ceed before the Commission or before the courts, but not both, it seems clear that the same result should be reached under the Walsh-Healey Act where the statute plainly implies that the court action must follow and be based on the administrative award, and such has been the uniform administrative practice for 15 years. (See Petition in No. 293, pp. 17–21). This rule has not been restricted to the Interstate Commerce Act. See *Kelly* v. *Union Stockyards*, 190 F. 2d 860, 863 (C. A. 7), decided under the Packers and Stockyards Act, which provides a cause of action for persons injured by its violation, and that "Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction." See also *Addison* v. *Holly Hill Co.*, 322 U. S. 607; *Fed. Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37; *Fed. Comm. Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Ford Motor Co.* v. *Nat. Lab. Rel. Bd.*, 305 U. S. 364. No sound reason appears why it should not be applied to the Walsh-Healey Act, where uniformity in administration and interpretation are equally necessary.

CONCLUSION

For the reasons set forth above and in the petitions for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, writs of certiorari issue to the

Courts of Appeals for the Fourth and Fifth Circuits, respectively.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

LANCE, INCORPORATED

No. 294

UNITED STATES OF AMERICA, PETITIONER

v.

LOVKNIT MANUFACTURING CO., INC.

PETITION FOR REHEARING OF ORDERS DENYING PETITIONS FOR WRITS OF CERTIORARI

The Solicitor General, on behalf of the United States of America, prays that this Court grant rehearing of its orders of December 11, 1951, denying the petitions for writs of certiorari, and that writs of certiorari issue to review the judgments of the Courts of Appeals for the Fourth and Fifth Circuits in the above-entitled cases, as prayed for in the petitions filed August 30, 1951, herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

LANCE, INCORPORATED, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

The petition for rehearing is based on the case of McMahon v. United States, decided November 5, 1951, subsequent to the filing of the petition for certiorari. The petition does not meet the requirements of paragraph 2 of Rule 33 of the Supreme Court for the following reasons:

The ground stated in the petition is not confined to intervening circumstances of substantial or controlling effect, as required by the Rule. *Massey v. United States, 291 U.S. 608.* In the Massey case the ground stated related to an intervening amendment to the Constitution of the United States.

Nor does the petition state other substantial grounds available to petitioner although not previously presented as required by the Rule. *Schriber-Schroth Co. v. Cleveland Trust Co. 305 U.S. 47.* In this case the ground stated for rehearing was that there was no possibility of a conflict of opinion between Circuits due to the concentration in one circuit of the industry involved in the case.

On page 3 of the petition for rehearing the petitioner quotes from the McMahon decision to the effect that under the Act involved in that case during the years before the statute was amended the limitation depended upon the event giving rise to the claims and not upon the rejection, and that later when the right to sue was broadened there was no indication of any change in the limitation contained in the older Act; and then the petitioner goes on to say that here the situation is the reverse and that the Walsh-Healey statute for eleven years was consistently construed and enforced on the *assumption* that the administrative determination of liability and not the violation itself give rise to the claim on which suit could be brought. There may have been such an assumption in the Labor Department but our position is that such assumption was groundless from the beginning. During the eleven years that such assumption was in effect there was no test in court of the assumption. Now that the assumption has been tested by the courts and found wanting we submit that the recital of such an assumption is not a basis for granting certiorari. In the quotation from the McMahon case the court is stating its own construction of the statute in that case and the attempt of the petitioner to put its assumption on a level with a decision of the Supreme Court is not to be seriously considered. The original Walsh-Healey Act did not say that

an administrative proceeding was a prerequisite to a suit in court and the Portal-to-Portal Act amending it as to the statute of limitations did not say so. Thus, the situation in this case is the same as in the McMahon case in this respect: In the McMahon case there is no indication in the amendment of any change in the limitation and in the Portal-to-Portal Act which amended the Walsh-Healey Act, there is no indication of any change as to the administrative hearing. In the Portal-to-Portal Act the length of the period of limitations was fixed but there was no reference to any administrative proceeding.

Counsel for the Labor Department and surely the Solicitor General are acquainted with the reason for the enactment of the Portal-to-Portal Act. We need study only the caption or preamble to the Act to conclude that certain regulations and interpretive bulletins of the Labor Department prompted it. If Congress by the Portal-to-Portal Act was trying to confine the activities of the Labor Department to a more timely period with respect to Walsh-Healey, Wage and Hour and Bacon-Davis cases, it is somewhat inconceivable to assume that its intention was to place it within the power of the department to indefinitely suspend the Statute. As was stated in *United States* v. *Sligh*, 24 F. (2) 636 (C.C.A. 10, 1928), it is never the policy of the law to construe statutes so as to put it within the power of a party to toll the Statute of Limitation when it is running against him. One purpose of the Portal-to-Portal Act was to make the period of limitation uniform, since in the absence of a federal Statute of Limitation as to a federal Statute, the applicable state Statute, if any, would apply. See 28 U.S.C.A. § 725. The Statutes of many states varied from six months to five years.

On page 4 of petitioner's brief, cases are cited to the effect that statutes of limitations are to be construed strictly in favor of the sovereign. This question was discussed in the original petition (p. 12) where two of the cases were cited that are now cited by the petitioner. In the original petition it was argued that a statute of limitations does not apply to the government unless the intent to make it apply is express or "clearly manifest." The three cases now cited by the petitioner add nothing to its former brief because two of them, the Wheless case and the Davis case were cited on page 12 of the original brief and the third case now cited, "Independent Coal & Coke Co. v. United States," adds nothing to the holding of the other two cases. The rule that statutes of limitation are to be construed strictly in favor of the sovereign was doubtless applied in this case when the court denied certiorari thereby holding that when the stated rule is applied it is clearly manifest that the statute was meant to apply to suits instituted by the United States under the Walsh-Healey Act. As was stated by Judge Sibley in the Lovknit Manufacturing Co. case, if the Statute does not apply to the government in Walsh-Healey cases there is none to whom it could apply. The contrary would be equivalent to saying that Congress did a vain thing in mentioning the Walsh-Healey Act in passing the Portal-to-Portal Act.

On page 4 of its brief the petitioner states that the remaining reason specified in the McMahon opinion was that the Act involved in that case should not be construed so as to give the claimants an option as to when they will start the period of limitation of an action against the United States. If the petitioner's contention should prevail, we would have the situation that is condemned in the McMahon

case because the petitioner could withhold institution of administrative proceedings for an indefinite time, the statute would not begin to run until the final determination of the administrative proceeding, and thus the petitioner would have control of the statute of limitations. As to the point that the government does not know of the violations, it has an opportunity to learn of them because it has a period of two years within which to make its investigation. According to the statute the government's knowledge has nothing to do with the matter because there is no mention of the government's knowledge of the violation in connection with the statute of limitations. Furthermore, the government after acquiring knowledge of the violations could still control the starting of the statute of limitations according to petitioner's contention because it could postpone indefinitely the administrative proceeding. There is, therefore, nothing in the Walsh-Healey Act that suggests any legislative intent different from the legislative intent in the McMahon situation.

On page 5 of petitioner's brief, petitioner states that the question left unresolved in the McMahon case is presented by one of the instant cases, that is the question "whether the statute of limitations is tolled" pending completion of the requisite administrative proceedings. This statement involves an assumption that the administrative proceedings are a prerequisite which we contend is not correct.

This question now attempted to be raised was not raised in the courts below and cannot now be raised on petition for certiorari. *Weber v. Opera On Tour, Inc., 314 U.S., 615.*

The contention (page 6 of petitioner's brief) that the time consumed by the administrative proceedings should not be "charged" against any period of limitation is without merit. An administrative proceeding is not a judicial proceeding and there is nothing in the Walsh-Healey Act that gives the slightest ground for claiming that the statute of limitation is tolled while the administrative proceeding is in progress. It is as clear from the Act itself that the statute is not tolled while the administrative proceeding is in progress as it is that the administrative proceeding is not a prerequisite to institution of suit in court.

In any event the contention of the petitioner that the statute of limitations is tolled pending completion of the administrative proceedings does not apply to the case at bar, No. 293, United States of America, Petitioner v. Lance, Inc., because the administrative proceedings were not instituted until more than two years after the alleged violations. The latest violation alleged against Lance, Incorporated was May 24, 1945 and the Secretary of Labor did not start his administrative proceeding until February 28, 1948 and his "decision became final" according to the complaint on April 26, 1949. The suit was started in the District Court of the United States on September 7, 1949.

The contention of the petitioner beginning with the paragraph numbered 3 on page 7 to the effect that an administrative decision under the Walsh-Healey Act "is an indispensable prerequisite to judicial decision" was fully argued in the original petition for certiorari, pages 4-7 inclusive, and pages 16-22 inclusive, and in the respondent's brief in opposition to the petition for certiorari, pages 8-12 inclusive. The cases cited by the petitioner in

the petition for rehearing were not cited in the petition for certiorari but it is clear that they are not applicable because in the statutes involved in all of these cases any person having a claim under the statutes was expressly given a choice of remedies, either administrative or judicial, which were mutually exclusive. There is no similarity between the situations presented in those cases and in the case at bar and this would seem to be conceded by the petitioner when it admits on page 8 of its brief that one of the remedies provided in the statutes involved in the cases it cited was available, but not both.

We regret that Counsel for the Labor Department and the Solicitor General have interpreted the Portal-to-Portal Act to mean that instead of requiring the department to be a little more timely in its enforcement they must adopt entirely new procedures.

It is respectfully submitted that the petition for rehearing should be denied.

FRANK H. KENNEDY
Charlotte, North Carolina

WELBORN B. CODY
Atlanta, Georgia
Counsel for Respondent

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Nos. 293 and 294

IN THE

Supreme Court of the United States

October Term, 1951

UNITED STATES OF AMERICA, *Petitioner*

v.

LANCE, INCORPORATED

UNITED STATES OF AMERICA, *Petitioner*

v.

LOVKNIT MANUFACTURING CO., INC.

MOTION ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON PETITION FOR REHEARING OF ORDERS DENYING PETITIONS FOR WRITS OF CERTIORARI.

ARTHUR J. GOLDBERG
General Counsel
Congress of Industrial Organizations
718 Jackson Place, N. W.
Washington 6, D. C.

IN THE

Supreme Court of the United States

October Term, 1951

Nos. 293 and 294

UNITED STATES OF AMERICA, *Petitioner*

v.

LOVKNIT MANUFACTURING COMPANY, INC.

UNITED STATES OF AMERICA, *Petitioner*

v.

LANCE, INCORPORATED

MOTION ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON PETITION FOR REHEARING OF ORDERS DENYING PETITIONS FOR WRITS OF CERTIORARI.

This motion is filed* on behalf of the movant organization, whose interest in the questions before the Court stems from the direct interest of the members of its affiliated unions in the enforcement of the Walsh-Healey Act. The interest in the Act of the unions affiliated with the CIO has been expressed by the large part these unions have played in the proceedings to fix the "prevailing minimum wages" which are required to be paid by the Act. The members of these unions—the employees of those who contract with the Gov-

* The Solicitor General has stated that in accordance with his usual practice, he does not consent to the filing of a brief by movant as *amicus curiae*.

ernment—are the persons intended to be benefited by the Act. These employees are, indeed, the real parties in interest in the usual Government suit under the Act, for by Section 2 (49 Stat. 2036, 2037, 41 U.S.C. Sec. 36), the employee who has received less than the prescribed minimum wage, "on whose account such sums were withheld or recovered" by the Secretary of Labor, is entitled to be paid his share by the Secretary.

The minimum labor standards imposed by the Walsh-Healey Act are an indicia of the essential decency of our civilization. We will not permit goods to be made for the public use by child laborers or by workers who are paid less than the wage deemed a minimum for similar, healthful employment. Because it is a public mandate, however, the inevitable conditions of Governmental action must obtain. Due process requires a careful investigation, a judicious hearing with full rights to be heard, and findings of the facts of the violation by governmental hearing officers. Because, too, the entire body of industry produces for the Government, the area in which violations may take place is gigantic, with the consequence that time is again added to the process of investigation and adjudication of violation.

The administrative system, created and perfected by the expertise of the Department of Labor over the years, is the safeguard of the rights of the Government and of the millions of workers employed in the production of goods for the Government. The decisions below, if not reviewed, will disrupt the machinery of the Secretary of Labor for the orderly enforcement of the rights and duties created by the Walsh-Healey Act. Only from the most unrealistic understanding of industrial operations can it be suggested that the cause of action for violations of the Act accrues mechanically on the day of employment and that action can be brought without administrative proceedings and findings, as hastily as the Government may be required to bring an action for a blunt and open refusal to pay a deficiency assessed by the Commissioner of Internal Revenue.

The consequences wrought by the decisions below are of compelling importance to those intended to be benefited and

protected by the Act. We respectfully submit that such issues can be decided only by this Court and that the undersigned should be given an opportunity to present a brief, from the point of view of the unions affected, on the reasons why this Court should grant a hearing by granting the pending petition. Those unions represent the largest body of employees sought to be protected by the Act.

Respectfully submitted,

ARTHUR J. GOLDBERG
General Counsel
Congress of Industrial Organizations
718 Jackson Place, N. W.
Washington 6, D. C.

December, 1951.

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CHARLES ELMORE CROP
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OBJECTION OF RESPONDENT TO MOTION ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

IN THE

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FRANK H. KENNEDY,
Charlotte, North Carolina

WILBORN B. CODY,
Atlanta, Georgia
Counsel for Respondent

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v.

LANCE, INCORPORATED, RESPONDENT

OBJECTION OF RESPONDENT TO MOTION ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Rule 27 of the Supreme Court, paragraph 9(b), seems to require that consent of the parties be asked and refused before a motion to be permitted to file a brief as amicus curiae may be made. Consent of the respondent for the filing

of such a brief was not asked, but if it had been asked, it would have been refused.

The reasons of the respondent for withholding consent are as follows:

Rule 27 of the Supreme Court, paragraph 9(b), states that "a brief of an amicus curiae . . . may be filed only if submitted a reasonable time prior to the consideration of . . . a petition for writ of certiorari". It would be impossible for the movant to present a brief in compliance with this rule, since the petition for writ of certiorari has already been denied.

Rule 27, paragraph 9(c), of the Supreme Court provides: "When consent to the filing of a brief of an amicus curiae is refused by a party to the case, a motion, independent of the brief, for leave to file may timely be presented to the court." This motion is not timely, coming as it does after the petition for certiorari has already been denied.

Rule 27, paragraph 9(c), of the Supreme Court also provides that a motion for leave to file a brief as amicus curiae "shall . . . set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case". The motion is devoid of any such facts or questions of law. The motion does not even attempt to comply with this requirement. The movant makes no claim that the Solicitor General has not fully presented the case.

It would seem that the real interest of the movant and its members would be for the Labor Department to be re-

quired to bring suits promptly under the Walsh-Healey Act rather than for the Labor Department to have the power to postpone such suits indefinitely.

Respectfully submitted,

FRANK H. KENNEDY,
Charlotte, North Carolina

WELBORN B. CODY,
Atlanta, Georgia
Counsel for Respondent.